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Supreme Court, U.S.
FILED
AUG 21 1995
CLERK

No. 95-8

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

SICOR LIMITED, ALCO CHEMICALS LTD.,

Petitioners,

v.

CETUS CORPORATION;
CETUS GENERIC CORPORATION;
BEN VENUE LABORATORIES, INC.;
BEN VENUE GENERIC CORPORATION;
and CETUS-BEN VENUE THERAPEUTICS,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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August 21, 1995

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ARGUMENTS RAISED IN RESPONDENTS' OPPOSITION BRIEF ARE ERRONEOUS AS A MATTER OF LAW AND FACT

The CBVT Respondents' Opposition Brief largely avoids the central question presented in the Petition for Writ of Certiorari. The gravamen of the issue is whether, as a matter of law, there can be no antitrust violation when a market's dominant supplier regains its monopoly by capturing the only distributor available to the monopolist's sole significant competitor. Despite uncontested evidence of high entry barriers, the court below held that excluding a monopolist supplier's chief competitor from the market is of no legal consequence so long as the number of downstream distributors in the market remains the same.

The practical effect of the court of appeals' ruling is to eliminate antitrust liability for monopolists who foreclose their rivals from the market through exclusive dealing or full requirement contracts. This holding, which permitted a company with a 60% share of the market to capture its competitor's 30% market share, represents a substantial revision of existing antitrust law.

The CBVT Respondents seek to avoid this fundamental issue by shifting the focus from their own anticompetitive acts to a challenge of the Sicor Petitioners' status as an aggrieved competitor. CBVT argues that its collusive agreement to re-establish a market monopoly has no anticompetitive consequences because Sicor's manufacturing facility was closed at the time CBVT made the exclusive dealing arrangement.

CBVT's argument misconstrues the record in this case and the rationale of the court of appeals' holding. As the record indicates, the indefinite shutdown *pendente lite* of Sicor's manufacturing facility did not prevent Sicor from continuing to supply CBVT with doxorubicin, either from its own prior inventory or by supplying doxorubicin produced at another FDA-approved facility. (App. 19a-23a).

Moreover, the fact that Sicor remained a competitive source of supply was irrelevant to the court of appeals, which premised its summary dismissal of Sicor's antitrust claims on the erroneous legal conclusion that the exclusive dealing contract "promoted" competition and was supported by "valid business reasons ... *i.e.*, ... to make money." (App. 12a-13a).

Thus, the assertion that Sicor was not a viable manufacturer is both incorrect and, more importantly, immaterial to the legal issues deserving of the Court's attention. The important federal question generated by the court of appeals' decision is whether a triable issue exists as to whether competition is harmed by a monopolist's elimination of its only competitive source of supply.

Sicor has not contended that a preclusion of this nature and extent is *per se* illegal. As this Court has emphasized, where an exclusive dealing arrangement results in a significant foreclosure of a market, a determination as to whether the contract violates the Sherman Act is to be made under a rule of reason analysis. The court of appeals' decision, however, denies Sicor the opportunity to make this showing. By holding that there can be no harm to competition because the number of distributors, rather than sources of supply, remains the same, the court of appeals, in essence, establishes a **reverse** rule of *per se* **legality**. This newly established precedent is what places the decision below at odds with this Court's prior holdings as well as the rulings in several other circuit courts.

ARGUMENT

The court of appeals' holding was based on the court's review, and affirmance, of the district court's summary adjudication of Sicor's antitrust claims. The court of appeals held, as a matter of law, that for purposes of summary judgment elimination of a monopolist's chief competitor did not constitute a restraint of trade or combination to monopolize.

In opposing this Petition, CBVT contends that Sicor was not a competitor but rather a middleman; that Sicor was unable to perform its supply agreement with CBVT because its manufacturing facility was closed; and that CBVT had no contractual obligation to purchase alternative supplies from Sicor. These contentions are incorrect, but more to the point they are not the grounds upon which the court of appeals based its opinion. The decision below held that, even viewed in a light most favorable to Sicor, "the appellants [Sicor] failed to allege and show that the conduct complained of unreasonably restrained trade." (App. 11a).

This decision established an erroneous and virtually unattainable summary judgment standard for challenging the type of exclusive dealing arrangements described here. It is on that basis that the court of appeals' decision should be reviewed by this Court. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

I. THE CLOSING *PENDENTE LITE* OF SICOR'S PLANT IS IMMATERIAL TO PETITIONERS' STATUS AS AN AGGRIEVED COMPETITOR

CBVT contends that the indeterminate shutdown of Sicor's manufacturing plant deprived Sicor of any standing to recover as an aggrieved competitor, and that the court of appeals so concurred. (CBVT's Opposition to Petition ("Opp. Brf.") at 9). To the contrary, the court of appeals' opinion recognized that Sicor was a competitor, but stated that its status as a competitive source of supply was "beside the point" under the court's so-called "pro-competitive" analysis at the distribution level.

> Sicor's allegation that no other finisher-distributor would have been readily available to contract with Sicor ... is arguably beside the point, for elimination of Sicor as a competitor would still leave the market essentially where it was before Sicor's entry, *viz.*, with two pro-

ducers and three finisher-distributors.

(App. 14a, n.9).[1]

Equally misleading and erroneous is CBVT's assertion that the court of appeals' analysis somehow turned on the question of whether Sicor was, as CBVT contends, a mere "middleman." (Opp. Brf. at 5). The court of appeals stated that it "need not reach the merits" of the contention that "Sicor, as a mere middleman, lacked standing to assert a claim under federal antitrust law." (App. 15a, n.10). Moreover, it noted, "the district court did not base its holding on this conclusion." (*Id.*) And, even if Sicor had functioned as a middleman, the court of appeals disputed CBVT's contention that Sicor would be precluded from asserting a claim for injury under the antitrust laws. (*Id.*)

Indeed, read in its entirety, the court of appeals' decision acknowledges what the uncontested record makes clear, namely, that Sicor was a direct competing source of supply in the relevant market. Sicor was without question an F.D.A. approved manufacturer of bulk doxorubicin, and Sicor sold this self-produced bulk doxorubicin to CBVT for finishing and resale in the United States. (App. 3a, 63a). This arrangement directly paralleled and competed with the once-monopolistic vertical arrangement between the dominant U.S. supplier Erbamont, its commonly-owned sister manufacturing company Farmitalia, and their wholly-

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[1]/ CBVT also contends that the use of the term "rival manufacturer" in Sicor's statement of Questions Presented "eliminates any possibility of petitioners recovering" because Sicor's parent company, Sicor S.p.A., and not Sicor, controlled the Sicor manufacturing facility. (Opp. Brf. at 4,9). As Rule 14.1(a) makes clear, however, "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein." The record on appeal leaves no doubt that Erbamont and Sicor both competed as sources of supply in the relevant market through commonly held ownership interests in their respective affiliated manufacturing facilities.

owned U.S. distributor, Adria (App. 3a-6a, 63a).

Noting the direct competition between the two arrangements, the court of appeals stated that, when Sicor and Respondent CBVT entered the doxorubicin market in 1988, the Erbamont-Farmitalia Group "responded immediately to this challenge to their dominant position in the United States market." (App. 4a). When Erbamont's market share dropped from more than a 90% level to 60% as a result of Sicor-CBVT's intense price competition, the Erbamont-Farmitalia Group "did not ignore this competition." (App. 6a). Legal actions were taken by the Erbamont-Farmitalia Group in Italy, resulting in the issuance of a non-final injunction by the Italian authorities, interrupting *pendente lite* the production of doxorubicin at Sicor's Milan facility. (App. 6a).

It is this indefinite *pendente lite* closure of the Sicor facility which CBVT now argues precludes Sicor from challenging the dismissal of its antitrust claims. As with CBVT's other arguments, however, its contention that Sicor "had no competition to offer since the Italian authorities shut down Sicor, S.p.A.'s plant" must also fail as a matter of law and fact. As a factual matter, although the Italian injunction was in effect at the time CBVT abrogated its agreement with Sicor and contracted to purchase doxorubicin exclusively from the Erbamont-Farmitalia Group, Sicor still had additional inventory of self-produced doxorubicin available to sell CBVT. The court of appeals recognized as much, acknowledging that Respondent CBVT "declined" an offer of Sicor-produced doxorubicin after the plant's September 1990 shutdown, "explaining that its inventory of Sicor-produced bulk doxorubicin would last until the following summer." (App. 6a).[2]

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[2]/ The court of appeals addressed the issue of Sicor's "ability to compete" in the portion of its opinion which reversed the district court's dismissal of Sicor's state law claims. Commenting on the (continued...)

In fact, Sicor's status as a viable supplier remained unchanged after the plant closing, with Sicor offering CBVT a continuing supply of F.D.A. approved and chemically equivalent doxorubicin -- either of its own manufacture or from another F.D.A. approved producer such as Mercian. Thus, at the time when CBVT and the Erbamont-Farmitalia Group made their anticompetitive and price-stabilizing arrangement, CBVT could have continued to purchase doxorubicin from Sicor under the terms and conditions of the parties' existing agreements.

This leads to CBVT's third contention, that Sicor was obligated under its supply and distribution agreements with CBVT to supply only doxorubicin which Sicor itself had made. The court of appeals rejected this argument, finding nothing in the pertinent section or appendix of the parties' supply agreement which "limits [the] 'compound' to doxorubicin manufactured by Sicor." (App. 18a). To the contrary, the court of appeals emphasized that "[t]he record contains substantial evidence that CBVT acquiesced in or even agreed to Sicor's efforts to secure an alternate supplier." (App. 19a).

The court of appeals' conclusions on this issue further call into question the propriety of its holding on Sicor's antitrust claims. If, as Sicor contends, the supply and distribution agreements permitted it to supply doxorubicin from an alternate source, then CBVT's abrogation of the contracts and its entry into an all requirements contract with the Erbamont-Farmitalia Group cannot be construed as "pro competitive."

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[2](...continued)
district court finding that "plaintiffs can prove no damages ... because they have been incapable of competing in the U.S. bulk doxorubicin market since September of 1990," the court of appeals simply stated: "We find insufficient support in the record for this conclusion." (App. 23a).

Even if CBVT had established that the existing supply and distribution agreements did not permit Sicor to supply doxorubicin from an alternate producer, CBVT's exclusive dealing contract with the Erbamont-Farmitalia Group would still violate the antitrust laws. That is because CBVT had available to it, and rejected, a more competitive alternative than the exclusive dealing arrangement which restored the Erbamont-Farmitalia Group to its original market monopoly. Thus, even if CBVT were no longer obliged to purchase bulk doxorubicin from Sicor, it had the opportunity to do so. Not only did CBVT have that opportunity, but the price and other terms of an ongoing supply agreement with Sicor would have been identical to the parties' existing arrangement.

This Court has held repeatedly in the context of Clayton Act Section 7 cases that additional concentrations of market power by an already powerful seller may not be accomplished through acquisition of another significant seller if there is a more competitive alternative. *See Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969); *see also, Diebold*, 369 U.S. 654 (1962).[3] The test of illegality under Section 7 of the Clayton Act is whether the concentration of market power through acquisition will "tend to create a monopoly." 15 U.S.C. § 18. In the instant case, the additional concentration of market power which occurred by virtue of the exclusive dealing contract not only tended to create a monopoly, it did so.

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[3]/ In *Citizen Publishing*, the concentration of market power through a joint marketing arrangement was held to violate **both** the Clayton Act § 7 and the Sherman Act § 2. The Court's rejection of a failing company doctrine defense to the joint marketing arrangement appears to have been intended to apply to both of the violations. In each case, the defense failed because there were other and more competitive alternatives to concentrating additional power in the already dominant company.

Since the harm of market concentration and foreclosure sought to be prevented by Section 7 of the Clayton Act is the same harm that is proscribed by Section 2 of the Sherman Act, it would seem fitting that an exclusive dealing/requirements contract be measured by the same criteria. If the anticompetitive evil consists of allowing a dominant company within a market to increase that dominance and control over prices by increasing its market share, then the same result is reached whether the increase is accomplished by merger or by an exclusive dealing contract.[4]

Nor can such an anticompetitive result be immunized from antitrust liability merely because the objective of the monopolist was "to make money." The court of appeals' acceptance of this new justification for market foreclosure, that of increasing profit, is contrary to this Court's principles for rule of reason analysis, and conflicts with holdings in other circuits. "[B]ecoming a monopoly simply to make more money is not a 'legitimate business justification' for 'monopolizing'." *Poster Exchange, Inc. v. National Screen Serv. Corp.*, 431 F.2d 334, 340 (5th Cir.), *cert. denied*, 401 U.S. 912 (1970).

II. THE DECISION SOUGHT TO BE REVIEWED CONSTITUTES A FINAL DETERMINATION OF PETITIONERS' ANTITRUST CLAIMS

The issues raised by this Petition arise out of the district court's Rule 54(b) dismissal of Sicor's antitrust claims, and the court of appeals' affirmance of that disposi-

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[4]/ There can be little doubt that if Erbamont and its distributor, with a 60% market share, had attempted to purchase the rival distributor CBVT, with a 30% share in a high entry barrier market, the acquisition would be declared unlawful under both the Clayton Act § 7 and Sherman Act § 2. Thus, there is good reason to apply the "more competitive alternative" test to the exclusive dealing contract at issue here.

tive ruling.[5]

In its Final Judgment of Dismissal, dated March 12, 1993, the district court "expressly" found that there was "no just reason for delay" and directed the entry of "a final judgment" as to Sicor's claims. (App. 57a). On April 3, 1995, the court of appeals entered judgment affirming the district court's final adjudication of Sicor's antitrust claims, reversing and remanding only that portion of the district court's opinion dealing with Sicor's wholly separate state law claims. (App. 1a, 30-31a).

Where, as here, a judgment conclusively disposes of claims which are distinct from the remainder of the litigation, such judgment is considered final for jurisdictional purposes. *See Sears, Roebuck and Co. v. Mackey*, 351 U.S. 427 (1956); *see also*, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945), holding that a review of federal law issues is appropriate where remaining claims "could not remotely give rise to a federal question".

In *Sears*, this Court found that plaintiff's antitrust claims -- *i.e.*, restraint of competition, wilful destruction of business, and monopolization under Sections 1 and 2 of the Sherman Act -- were "separate and independent" from plaintiff's pending common-law claims, which accused Sears of "unlawfully inducing a breach of [plaintiff's] commission contract" and "unlawfully destroying [plaintiff's] business by unfair competition and patent infringement." *Id.* at 430-31. Dismissal of the antitrust claims by the district court was held to constitute a "final decision" within the "meaning of Rule 54(b)." *Id.* at 436.

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[5]/ The court of appeals denied CBVT's motion for rehearing by the Panel and suggestion for rehearing *en banc* (*see* copy of July 10, 1995 Order, contained herein at App. 71a), and now has issued its Mandate (*see* copy of July 27, 1995 Notice, contained herein at App. 73a).

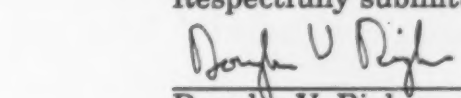
The same analysis, and result, are appropriate here. Sicor's antitrust claims are distinct from its state law claims, which focus on CBVT's obligations under a separate and independent contract, and on CBVT's tortious interference with Sicor's business relations with a third party. These state law claims do not rely on, or even refer to, the Sherman Act provisions that form the basis for the antitrust claims at issue here.

Similarly, CBVT lacks any basis for asserting that there is a "likelihood" that the questions presented by this Petition may become moot. The court of appeals' underlying rationale with respect to the antitrust issues is independent of the contract questions which were remanded for trial.

CONCLUSION

Final judgment, based upon the purported "pro-competitive" reasons enunciated by the court of appeals, has been entered. If this Court does not review that judgment, then it will remain the law in the Ninth Circuit that a monopolist supplier's deliberate preemption of its only effective competition is immune from challenge as long as the number of distributors in the relevant market remain the same. This inconsistent result would eviscerate the uniform application of this Court's rule of reason analysis with respect to exclusive-dealing contracts. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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